

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**ORIENTAL TRADING COMPANY,
INC., a Delaware Corporation,**

Plaintiff,

vs.

**AMERICAN SAFETY INDEMNITY
COMPANY, an Oklahoma
Corporation,**

Defendant.

CASE NO. 8:08CV327

**MEMORANDUM
AND ORDER**

This matter is before the Court on the Plaintiff's Motion for Leave to File Motion for Summary Judgment (Filing No. 90). Defendant objects to this motion (Filing No. 93) because the deadline for filing motions for summary judgment has expired. For the reasons discussed below, the Court will permit Plaintiff to file its proposed motion out of time, and Defendant's objection will be overruled.

DISCUSSION

Plaintiff Oriental Trading Company, Inc.'s ("OTC") proposed motion for summary judgment seeks a declaration that Defendant American Safety Indemnity Company ("ASIC") breached its duty to defend as a matter of law under a Commercial General Liability Policy (the "Policy") and is entitled to damages resulting from that breach. In its Order of July 2, 2010, the Court granted OTC's Motion for Partial Summary Judgment that ASIC's duty to defend OTC had been triggered under the Policy (See Filing No. 89). Because the issue of breach was not before the Court and had not been argued by the parties at that time, the Court did not decide that issue.

To preserve judicial resources, the Court will allow OTC to file its motion. The parties' previous filings indicate that no substantial dispute remains as to the material facts affecting OTC's proposed motion for summary judgment. The question of whether ASIC breached its duty to defend, or whether ASIC's failure to defend is justified, is therefore a question of law and would not be addressed by a jury. Trial preparations for both parties will undoubtedly address this issue, and the outcome of the motion will determine whether a trial on the merits is necessary. Thus in the interest of efficiency for the parties and the Court, OTC will be permitted to file its proposed motion. The Court notes that it is allowing the motion to proceed to preserve judicial resources, and not because it has found excusable neglect by OTC under Federal Rule of Civil Procedure 6(b). Consequently, should ASIC incur additional costs and expenses in defending OTC's motion for summary judgment that it would not otherwise have had to bear, the Court will entertain motions to recover said costs. Further, the Court will postpone the pretrial conference for an additional thirty days to allow ASIC to respond to the motion before the pretrial conference takes place.

Accordingly,

IT IS ORDERED:

1. Plaintiff Oriental Trading Company Inc.'s Motion for Leave to File Motion for Summary Judgment (Filing No. 90) is granted;
2. Defendant American Safety Indemnity Company's Objection (Filing No. 93) is overruled;
3. Plaintiff shall immediately file as a separate docket entry the Motion for Summary Judgment and Brief attached to its Motion for Leave to File its Motion for Summary Judgment;

4. Defendant shall respond to Plaintiff's Motion for Summary Judgment within the time prescribed by the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Nebraska; and
5. The final pretrial conference is continued from August 20, 2010, to Monday, September 20, 2010, at 1:30 p.m. before Magistrate Judge F.A. Gossett.

DATED this 4th day of August, 2010.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge